

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

BARBARA JANE FRECK, GLORIA	)	
ROBINSON, JALEEZA OWENS, LYNN	)	
MUSERELLI, PAUL CAPELLO, JIM	)	
HELTON, and JOSHUA CLARK	)	
individually and on behalf of all others	)	
similarly situated,	)	Civil Action
	)	No. 4:20-cv-00043-BCW
Plaintiffs,	)	
	)	
v.	)	
	)	
CERNER CORPORATION, et al.,	)	
	)	
Defendants.	)	

I, Scott C. Nehrbass, Esquire, as Class Counsel, declare as follows:

1. I am a member in good standing of the Bars of the States of Missouri and Kansas. I was first admitted in 1993 in Kansas, with bar registration #16285, and in 1995 in Missouri, with bar registration #46529.
2. I am also admitted, or admitted pro hac vice, in various other courts, including the United States Supreme Court.
3. After graduating from the University of Kansas School of Law in 1993, I clerked for two years with United States District Court Judge Monti L. Belot in Wichita, Kansas.
4. Thereafter, in the fall of 1995, I joined the Overland Park, Kansas office of Shook Hardy & Bacon LLP, where I worked as a litigation associate and became a partner.
5. In the fall of 2004, I joined the Overland Park office of Foulston Siefkin LLP, Kansas' largest law firm, with offices in Wichita, Topeka, and Overland Park. I have been a partner at Foulston since 2006.

6. At both Foulston and Shook, my practice has focused on complex commercial litigation, including ERISA and class action cases.

**The *Clark* Case and Filing of Same in Kansas**

7. During the days leading up to our Kansas City Chiefs Super Bowl run in early 2020, our Foulston ERISA 401k Class Action team was in the throes of preparing a ERISA 401k Class Action case against Cerner in Kansas federal court.

8. The present case against Cerner, by Ms. Barbara Freck, was then filed in the Western District of Missouri on or about January 21, 2020. I spoke with Ms. Freck's counsel, Mr. Gyandoh, regarding the case from my hotel room in Miami, Florida before the Super Bowl and the possibility of our joining forces then.

9. Our Foulston team monitored this Barbara Freck case and, on April 7, 2020, noted Cerner's filing of a motion to dismiss Ms. Freck's case because she had signed an arbitration clause.

10. Our Foulston team was aware of the arbitration concern. Unlike Ms. Freck and the other three plaintiffs in the *Freck* action, Gloria Robinson, Jaleeza Owens, and Lynn Muserelli, our client and proposed class representative, Mr. Joshua Clark, had not signed an arbitration clause; moreover, Mr. Clark was still a member of the Cerner Plan. In addition, our Foulston team had identified certain claims against Cerner that Ms. Freck had not stated, including a claim regarding whether the use of Cerner stock as the source of Cerner's employer matching contribution and the resulting over-concentration of Plan assets in Cerner stock was a fiduciary breach. Given the foregoing, our Foulston team proceeded to go ahead and file Mr. Joshua Clark's action against Cerner in Kansas federal court, *Clark v. Cerner Corporation et al*, Case No. 2:20-cv-02194-EFM-TJJ.

11. In the days and weeks that followed, communications with Mr. Gyandoh and with Cerner's counsel ensued, and Mr. Clark and our Foulston team received targeted discovery and document production from Cerner and were invited to participate in a mediation of both the *Freck* (Missouri) case and the *Clark* (Kansas) case before Mr. Hunter Hughes, the same mediator we had worked with in the prosecution and settlement of a 401k class action against Kansas City-based Waddell & Reed.

12. Our Foulston team and Mr. Clark participated very meaningfully in the successful mediation before Mr. Hughes. Our Foulston team pored over the documents produced by Cerner and prepared a lengthy and substantial mediation statement. My colleague Boyd Byers and I attended the mediation, and Mr. Clark himself also attended. We caucused with Ms. Freck's counsel, including Mr. Gyandoh. We dialogued extensively with Ms. Freck's counsel during those caucuses, and we presented arguments to the mediator, especially regarding the points raised in our team's mediation statement. We participated fully and meaningfully in the assessment of each offer and counteroffer during the mediation and the mediation strategy.

13. Following the successful mediation and settlement of the combined Clark and Freck cases, our Foulston team worked with Mr. Gyandoh to agree upon suitable class representative compensation for Mr. Clark and a sharing of the attorney fees between and among counsel. It was decided, as a practical matter, that Mr. Clark and our Foulston team would be added as a class representative plaintiff and class counsel, respectively, in the *Freck* case and that the District of Kansas case would be dismissed, so that the entire settlement approval and class certification process could be accomplished more effectively and efficiently before this single federal court.

#### **The Foulston Team's Experience and Suitability as Class Counsel**

14. Our Foulston team's reputation for excellence and experience with these types of cases and Kansas City area federal courts make it suitable to serve among the class counsel here.

15. A firm profile for our Foulston ERISA 401k litigation team is attached hereto as Exhibit A.

16. The firm profile attached hereto details some of my, Mr. Boyd Byers, and other Foulston team members' qualifications, training, and experience in class action ERISA and employment litigation.

17. Our team's experience with ERISA class action cases includes the successful prosecution and settlement of the aforementioned Waddell & Reed case. That case was filed on June 23, 2017 in Kansas federal court and assigned to Chief Judge Julie Robinson. On February 22, 2018, Judge Robinson denied Waddell & Reed's substantial motion to dismiss. Thereafter, the parties participated in targeted discovery and, on August 7, 2018, settled the case in a mediation before Mr. Hunter Hughes.

18. Judge Robinson approved the Waddell & Reed settlement. Our Foulston team then (in coordination with the class administrator and Waddell & Reed's counsel) saw to the successful administration of the settlement.

19. Judge Robinson also approved our Foulston team's motion for attorney fees, administrative expenses, and class representative compensation, which was supported by an affidavit from respected Kansas City attorney Eugene Balloun.

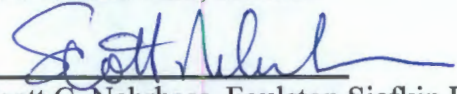
20. Judge Robinson observed in the Waddell & Reed case:

- "This firm is well-respected in this type of litigation and has extensive experience in representing classes in this type of litigation."
- "Foulston Siefkin has a wealth and great experience in the law that governs these type of cases."

- Foulston Siefkin “has the requisite resources to appropriately and more than adequately represent the class.”

I declare, pursuant to 28 U.S.C. §1746 and under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 18<sup>th</sup> day of February 2021, in Overland Park, Kansas.

  
\_\_\_\_\_  
Scott C. Nehrbass, Foulston Siefkin LLP  
Missouri Bar #46529  
***Proposed Class Counsel***



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## EXHIBIT A FOULSTON SIEFKIN LLP FIRM PROFILE

Foulston Siefkin LLP is the largest law firm based in Kansas. The firm has extensive experience litigating cases in federal and state courts in Kansas, Missouri, and other jurisdictions. Foulston lawyers have litigated and tried numerous cases in the District of Kansas and argued appeals in the Tenth Circuit Court of Appeals.

Chambers USA, an international research publication, ranks Foulston Siefkin as the overall leading law firm in Kansas. Forty-nine Foulston Siefkin attorneys have been selected by their peers to be included in The Best Lawyers in America, one of the preeminent legal referral guides in the United States. Thirty-three Foulston Siefkin attorneys are listed in Missouri & Kansas Super Lawyers (only five percent of attorneys in each state or region are so recognized). Six Foulston attorneys are Fellows of the prestigious American College of Trial Lawyers; two are Fellows of the Litigation Counsel of America; and one is a fellow of the American Academy of Appellate Lawyers.

The firm has been litigating cases for nearly a century and next year will celebrate its 100th anniversary. During that time, the firm's attorneys have participated in numerous sophisticated business, employment, and other litigation matters, including numerous class and collective actions. As the legal profession moved away from an industry of generalists and toward one of specialists, the firm developed practice teams, such as the employment and labor team and several litigation teams.

Spread across three offices within the State of Kansas – Kansas City, Wichita, and Topeka – various members of Foulston's relevant teams worked together to bring *Schapker v. Waddell and Reed Financial, Inc. et al.* to a favorable resolution for the prospective class.

### EMPLOYMENT AND LABOR TEAM

Foulston Siefkin's Employment and Labor Law team, more than 20 lawyers strong, has depth, experience, and expertise unmatched by any other Kansas-based law firm. Our size and proficiency allow us to deliver top-notch, cost-effective legal services to clients of all sizes in a wide range of industries, covering the full range of issues that arise from the employment relationship, including numerous specialty areas.

The firm has a long history of representing clients in employment and employee benefit litigation matters, including numerous class actions, collective actions, and other complex litigation. Our employment lawyers have served as both lead counsel and local counsel in a wide

variety of significant class-action litigation, including discrimination, ERISA, and wage-and-hour claims.

Foulston Siefkin's Employment and Labor Law Team has been recognized and honored by peers and law firm ranking organizations. The team is a top-rated employment and labor law firm in Kansas according to Chambers & Partners, which ranks the law firms and lawyers based on in-depth research and client and peer interviews. According to Chambers, the firm is "[w]ell versed in handling ERISA and employee benefit matters" and is also "adept in employment litigation with the team regularly representing clients in complex class action matters." (Chambers USA 2017). Chambers notes that team leader Boyd Byers is "a highly experienced employment law litigator with extensive experience in class actions . . . ." (Chambers USA 2017).

#### **LITIGATION AND DISPUTES TEAM**

With an established reputation for quality, integrity, and client satisfaction throughout Kansas and beyond, Foulston Siefkin's Litigation & Disputes team handles a broad array of commercial and complex disputes for clients ranging from Fortune 500 companies, closely held businesses, startups, and individuals to government entities, educational institutions, and nonprofits. The practice's work encompasses high-profile, bet-the-company litigation, as well as actions necessary to help and protect small businesses and individuals. The firm's litigators prosecute and defend all types of civil litigation, ranging from complex class action and antitrust cases to ordinary breach of contract and negligence matters.

Practicing out of offices in Kansas City, Wichita, and Topeka, Foulston Siefkin's attorneys have extensive experience in local, state, and federal trial and appellate courts, as well as in many types of administrative and specialty proceedings. The practice is known for its rapid response to emergency litigation, such as obtaining or defending against restraining orders and injunctions; its robust e-discovery capabilities; and the ability to draft and argue persuasive motions.

Foulston Siefkin is the top-rated firm in Kansas for General Commercial Litigation, according to Chambers and Partners. The firm is also only one of two firms in Kansas ranked as "Highly Recommended" by Benchmark Litigation, a legal guide that researches and evaluates law firms.

#### **COUNSEL OF RECORD: SCOTT NEHRBASS, PARTNER**

Scott Nehrbass has 25 years of litigation and trial experience as a partner at both Foulston Siefkin and Shook Hardy & Bacon LLP. Mr. Nehrbass has represented many individual and corporate clients in numerous and varied business and tort litigation matters. He has tried jury and bench cases in the Kansas state and federal courts and argued appeals before the Tenth Circuit, Kansas Supreme Court and Kansas Court of Appeals. Mr. Nehrbass has particularly extensive experience litigating in the Kansas federal courts and was a law clerk to the Honorable Monti L. Belot.



Mr. Nehrbass is a past president of the Kansas Association of Defense Counsel and current chair of the Johnson County Bar Association's Civil Litigation Section. He served 10 years on the Ethics & Grievance Committee of the Johnson County bar, donating his time and service to the bar investigating ethics complaints against Johnson County attorneys.

Mr. Nehrbass enjoys Martindale-Hubbell Law Directory's highest "Preeminent AV" rating. He has been consistently selected by his peers for inclusion in The Best Lawyers in America© and the Missouri & Kansas Super Lawyers® lists, and Benchmark Litigation has consistently named Mr. Nehrbass a "Future Star." Mr. Nehrbass has also been named "Lawyer of the Year" in his areas of practice, as the 2016 Best Lawyers® Kansas City, KS Personal Injury Litigation "Lawyer of the Year" and 2013 and 2017 Best Lawyers® Kansas City, KS Litigation – Intellectual Property Litigation "Lawyer of the Year."

**COUNSEL OF RECORD: BOYD BYERS, PARTNER**

Boyd Byers is the Team Leader of the firm's Employment Law Team. He has practiced employment law for over 25 years and has litigated employment law cases in Kansas, Missouri, Colorado, Oklahoma, and other jurisdictions. He has extensive experience handling class actions, collective actions, and other complex litigation.

Mr. Byers is a Past President of the Kansas Bar Association Employment Law Section and serves on the Board of Editors of the Journal of the Kansas Bar Association. He has Martindale-Hubbell Law Directory's highest "AV" rating. He has been recognized by peers for inclusion in The Best Lawyers in America© in the areas of Employment Law (Management), Labor Law (Management), and Employment Litigation (since 2007) and Missouri & Kansas Super Lawyers® in the area of Employment & Labor (since 2008). Best Lawyers named him Wichita's 2017 "Lawyer of the Year" for Labor Law (Management) and 2015 "Lawyer of the Year" for Employment Law (Management).

**COUNSEL OF RECORD: NICKI ROSE, ASSOCIATE**

Nicki Rose joined Foulston Siefkin as an associate following her service as a law clerk for a Kansas federal judge, the Honorable Daniel Crabtree. Ms. Rose's experience as a federal law clerk was a substantial asset to the team in the prosecution of this case.

**ASSISTING COUNSEL: JASON LACEY, PARTNER**

Foulston Siefkin partner Jason Lacey practices primarily in the areas of income taxation, ERISA, employee benefits, and executive compensation. He assists both taxable and tax-exempt employers with a wide variety of employee benefit and executive compensation issues, including design and administration of welfare benefit plans and qualified and nonqualified pension, retirement savings, and deferred compensation plans. He also regularly provides subject matter support on technical ERISA issues to the firm's litigators in ERISA and other employee benefits cases.



Mr. Lacey co-authored the ERISA litigation chapter in the current edition of the Kansas Bar Association Employment Law Handbook. He is an in-demand speaker who gives presentations on ERISA-related topics across the country, including, among many others, seminars for the American Bar Association, and the national conference for the Society of Professional Benefit Administrators in Washington, DC. He has been selected by his peers for inclusion in *The Best Lawyers in America*®, the *Missouri & Kansas Super Lawyers*® Rising Star list, and *Chambers USA*. He was recognized by *Best Lawyers*® as the 2014 and 2017 Wichita Employee Benefits (ERISA) “Lawyer of the Year.”

#### **WADDELL & REED 401K CLASS ACTION ERISA LITIGATION**

The Foulston team successfully prosecuted another 401k case against another prominent, household-name Kansas City company, Waddell & Reed, *Schapker v. Waddell & Reed Financial, Inc. et al.*, Case No. 2:17-cv-02365-JAR-JPO, in the United States District Court for the District of Kansas. That case was filed in May 2017 in Kansas federal court and assigned to Chief Judge Julie Robinson. The same defense counsel, Morgan Lewis, represented Waddell & Reed, and they filed a very substantial and strong motion to dismiss. The Foulston team successfully opposed that motion to dismiss. 2018 U.S. Dist. LEXIS 28458 (Feb. 22, 2018). Targeted discovery ensued, and the case was mediated and settled using the same mediator as the Cerner case, Mr. Hunter Hughes.

The settlement closed in May of 2019, two years after the litigation began, with a \$4.875 million settlement and one-third plus expenses attorney fee approved by Judge Robinson. At the settlement approval hearing in Waddell & Reed, two members of our team, Messrs. Scott Nehrbass and Boyd Byers, personally appeared before Judge Robinson and presented. One of the most-respected senior lawyers in the Kansas City metropolitan area, Mr. Gene Balloun of Shook Hardy & Bacon L.L.P., supported Foulston’s successful fee application. Judge Robinson said some flattering things about Foulston:

- “This firm is well-respected in this type of litigation and has extensive experience in representing classes in this type of litigation.”
- “Foulston Siefkin has a wealth and great experience in the law that governs these type of cases.”
- Foulston Siefkin “has the requisite resources to appropriately and more than adequately represent the class.”

The Waddell & Reed 401k case was followed closely by the local business and legal community. The settlement was the subject of national and local publicity, and the Kansas City Business Journal juxtaposed it with the case against American Century in the Western District of Missouri that resulted in a defense verdict:

### **Waddell & Reed settles class action accusing it of breaching fiduciary duty**

By [James Dornbrook](#) – Staff Writer, Kansas City Business Journal  
Apr 17, 2019, 2:41pm EDT

Waddell & Reed Financial Inc. agreed to pay \$4.88 million to settle a class-action lawsuit filed against it by a former employee.

[Stacy Schapker](#) of Shawnee, a former paralegal at Overland Park-based Waddell & Reed (NYSE: WDR), [filed suit against the company in 2017](#), claiming that it breached its fiduciary duty and made prohibited transactions under the Employee Retirement Income Security Act of 1974 (ERISA). Schapker accused the company of forcing plan participants nearly exclusively into investment options managed by Waddell & Reed or affiliated entities that she claims in virtually all instances charged excessive fees and performed worse than comparable available options.

The 401(k) plan held \$190.38 million at year-end 2016, which was down 5.7% from \$201.95 million at the end of 2015.

The suit was filed in Kansas federal court. Waddell & Reed denied the accusations. The case ended up in [mediation], where a settlement agreement was reached.

Plaintiff attorneys at Foulston Siefkin LLP, led by [Scott Nehrbass](#) in the Overland Park office, were awarded \$1.71 million in legal fees and costs.

...

**The case against Waddell & Reed was similar to one filed against Kansas City-based American Century Investments in the U.S. District Court for the Western District of Missouri. That case went all the way to trial and ended in a rare defense victory.**



**SELECT OTHER PLAINTIFF'S CLASS-ACTION AND COLLECTIVE-ACTION CASES**

- *Geer v. Challenge Financial Investors Corp.*, No. 07-cv-1209: ERISA class action involving claims that the defendants prevented eligible employees from participating in 401(k) plan. (Boyd Byers lead counsel)
- *Flake v. Hoskins*, No. 98-2450: Securities fraud class-action settlement for \$5.7 million.
- *Gilmour v. Elite Transportation, LLC et al.*, No. 6:14-cv-01304 (D. Kan.): COBRA case involving failure to provide COBRA notices; the case successfully settled after mediation.
- *Enneking v. Schmidt Builders Supply Inc.*, No. 11-cv-4111 (D. Kan.): ERISA case involving claims of, among other things, fiduciary breach and fraud; case successfully settled for more than \$900,000.
- *United States ex rel. v. Akal Security, Inc.*, No. 6:04-cv-1325 (D. Kan.): Represented relators in False Claim Act case resulting in \$18 million settlement. (Boyd Byers part of legal team)
- *Equal Employment Opportunity Commission v. Akal Security, Inc.*, No. 6:08-cv-01274- (D. Kan.): Represented plaintiff class in Title VII pregnancy discrimination class action, settled for \$1.62 million. (Boyd Byers part of legal team)
- Numerous Fair Labor Standard Act collective actions (Boyd Byers lead or co-lead counsel), including: *Enegren v. KC Lodge Ventures III*, No. 2:17-cv-02285; *Ries v. Asurion*, No. 6:06-cv-01382 (D. Kan.); *Davis v. Royal Mortgage*, No. 2:08-cv-10704 (E.D. Mich.); *Barnes v. Akal Security, Inc.*, No. 6:04-cv-1350 (D. Kan.); *Fiers v. Akal Security, Inc.*, No. 6:07-cv-01047 (D. Kan.); *Flores v. Almas Business*, No. 6:14-cv-1046 (D. Kan.); *Gonzales v. Realty Mortgage*, No. 6:09-cv-1023 (D. Kan.); *Lewis v. Ark-La-Tex Financial*, No. 3:08-cv-1022 (N.D. Tex.); *Geer v. Challenge Financial Investors Corp*, No. 6:05-cv-1109, (D. Kan.); *Rice v. Bergin Financial, Inc.*, No. 2:07-cv-15504-DPH-SDP (E.D. MI); *Vargas v. Exide Technologies*, No. 6:06-cv-01137 (D. Kan.); *Streff v. Advantage Mortgage*, No. 8:04-cv-00253 (D. Neb.); *Zeka v. Citywide Mortgage*, No. 6:04-cv-01046 (D. Kan.); *Powell v. Render & Kamas*, No. 6:03-cv-01004 (D. Kan.).

**SELECT DEFENSE OF CLASS, COLLECTIVE, AND MULTI-PLAINTIFF CASES**

- *Raymond v. Spirit AeroSystems, Inc.*, No. 6:16-cv-1282 (D. Kan.): Age discrimination collective action; pending. (Boyd Byers part of legal team)
- *Apsley v. Spirit AeroSystems, Inc.*, No. 6:05-cv-1368 (D. Kan.): Age discrimination collective action in which plaintiffs sought over \$1.5 billion in damages. Obtained summary judgment on all class claims and subsequently obtained dismissal on remaining individual claims. (Boyd Byers part of legal team)



- *Society of Professional Engineering Employees in Aerospace v. Boeing Co.*, Nos. 05-cv-1251 and 07-cv-1043 (D. Kan.): Class action claims under ERISA and claims by unions and union-represented employees under Labor Management Relations Act § 301. Obtained summary judgment on some claims and favorable settlement of class claims; individual claims pending. (Boyd Byers part of legal team)
- *Smith, et al. v. Boeing Co.*, No. 6:05-cv-1073 (D. Kan.): Obtained summary judgment in False Claims Act and retaliation claims in which plaintiffs sought over \$1.6 billion in damages. (Boyd Byers part of legal team)
- *Shepherd, et al. v. Boeing Co., et al.*, No. 07-2208 (D. Kan.): Prevailed on motion to dismiss in multi-plaintiff case alleging employment-related antitrust and breach of contract claims in which plaintiffs were seeking over \$30 million in damages. (Boyd Byers lead counsel)
- *Gonzalez v. Associates Financial Service Co. of Kansas*, 967 P.2d 312 (Kan.): Successful defense of a consumer credit fraud class action.
- *Mitchael v. Intracorp, Inc.*, 179 F.3d 847 (10th Cir.): Successful defense of an antitrust class action.
- *Cole v. Hewlett Packard*, No. 90,164, 2004 WL 376471 (Kan. Ct. App.): Successful defense of a Kansas Consumer Protection Act class action.
- *Schultz v. Household Int'l*, No. 6:01-cv-1212 (D. Kan.): Defeated conditional class certification in national Fair Labor Standard Act collective action; later achieved dismissal of claims. (Boyd Byers lead counsel)
- Numerous Fair Labor Standard Act collective actions (Boyd Byers lead or co-lead counsel), including: *Gassel v. American Pizza Partners, L.P.*, No. 14-cv-00291 (D. Col.) (defendants operated approximately 100 Pizza Hut franchise restaurants); *Creech v. Pizza Hut of Southeast Kansas, Inc.*, No. 2:16-cv-02518 (D. Kan.) (defendants operated approximately 170 Pizza Hut franchise restaurants); *Tiffany v. K.O. Huts, Inc.*, No. CIV-15-1190 (W.D. Okla.) (defendants operated approximately 20 Pizza Hut franchise restaurants) (obtained order granting motion to compel individual arbitration based on class action waiver in employment agreement, an issue of first impression in this district); *Snowbarger v. New Horizons Dental Practice Mgt., LLC*, No. 16CV1687 (Eighteenth Judicial District, Kansas).